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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	IN EQUITY NO. C-125-RCJ
	)	Subproceeding: C-125-B
WALKER RIVER PAIUTE TRIBE,)	
	)	3:73-CV-00127-RCJ-WGC
Plaintiff-Intervenor,)	
vs.)	
	)	IDENTIFICATION AND SUMMARY OF
WALKER RIVER IRRIGATION DISTRICT,	)	FILINGS BY THE UNITED STATES OF
a corporation, et al.,	)	AMERICA AND THE WALKER RIVER
	)	PAIUTE TRIBE REGARDING:
Defendants.	)	1 WHEN ANSWERS MUST BE FILED;
	)	AND
	)	2. PROPOSED THRESHOLD ISSUES
)	

The United States of America (“United States”) and the Walker River Paiute Tribe (“Tribe”) (collectively “Plaintiffs”), through undersigned counsel, file the following identification and summary of their prior filings on two issues: 1. when answers must be filed; and 2. proposed threshold issues. Both issues are addressed to some extent in the *Case Management Order* (April 18, 2000; B-#108) (“CMO”), a copy of which is attached as Exhibit 1, along with copies of the Plaintiffs’ filings related to these issues. *See* Exhibits 2-6.

I. WHEN ANSWERS MUST BE FILED

The United States and the Tribe filed the following pleadings that address, in whole or in part, when answers must be filed in subproceeding C-125-B:

1. *The United States of America's and Walker River Paiute Tribe's Brief Regarding When Answers Need to be Filed in This Action* (Jan. 16, 2009; B-#-1487) (Exhibit 2).

This is Plaintiffs' most recent and key filing regarding when answers must be filed, which followed discussions of this issue in other filings, listed below. Plaintiffs address the Court's duty to reconcile the CMO with the requirements of the Federal Rules of Civil Procedure and the importance of identifying if final threshold issues are Rule 12 dispositive motions, because answers are not prerequisite to Rule 12 dispositive motions, while all other issues require answers before they can be addressed.

2. *The United States of America's and Walker River Paiute Tribe's Reply Regarding Proposed Preliminary Threshold Issues* (Nov. 3, 2008; #B-1452) ("Reply") (Exhibit 6).

Although this filing focuses on threshold issues, Section 5.A. discusses the need for answers in depth, pointing out concerns that go beyond complying with the Federal Rules of Civil Procedure, and attaches instructions for filing answers in an Indian water rights case issued by a federal court in another jurisdiction.

See Reply at 14-18 (Section 5.A.). *See also id.* at 6 n.5.

3. *The United States of America's and Walker River Paiute Tribe's Response Regarding Proposed Preliminary Threshold Issues* (Oct. 10, 2008; #B-1442) ("Response") (Exhibit 5).

This filing addresses the need for answers as a predicate to, among other things, the parties' ability to file motions that address the viability of various defenses. *See Response* at 15-16 (Section IV.A.2) and 32. *See also id.* at 16-17 (Section IV.B.) (addressing the rules that govern discovery and dispositive motions).

4. *The United States of America's and Walker River Paiute Tribe's Opening Brief Regarding Proposed Preliminary Threshold Issues* (Sept. 5, 2008; #B-1411) (“*Opening Brief*”) (Exhibit 4).

This early filing on threshold issues includes brief references to the need for answers.

See Opening Brief at 3, 4, 5, 6, and 9.

II. PROPOSED THRESHOLD ISSUES

A. Case Management Order:

The first source of information relevant to threshold issues is the *Case Management Order* (“CMO”) (Exhibit 1). The CMO directs that proceedings “**shall** be conducted in multiple phases, beginning as follows:

(a) **Phase I** of the proceeding shall consist of the threshold issues as identified and determined by the Magistrate Judge.

(b) **Phase II** will involve completion and determination on the merits of all matters relating to the said Tribal Claims.”

CMO at 11, ¶12 (emphasis added) (additional phases shall follow, as necessary. *Id.*) *See Response* at 2-9, 14-17; *Reply* at 5-9. Consequently, threshold issues that address the merits of the Tribal Claims contradict the CMO. Moreover, as set forth in Plaintiffs’ most recent filing regarding answers (Exhibit 2), the Court has a duty to reconcile the CMO with the requirements of the Federal Rules of Civil Procedure. Thus, an issue should not be designated a threshold issue as a means to litigate by short-cut and avoid the requirements of the Federal Rules of Civil Procedure.

The CMO also identifies the general kinds of issues that constitute threshold issues. Although Judge Reed directed the Magistrate Judge in the CMO to make both the preliminary and final identifications of the issues to be addressed as threshold issues for the Tribal Claims, he also directed that “[i]n general, threshold issues, among others, shall address jurisdiction, claim[]

preclusion, applicable law, equitable and other defenses which may be raised by any party.” *Id.* at 9, ¶11.

Furthermore, Judge Reed directed the Magistrate Judge in the CMO to consider including as threshold issues eight specific issues that the parties and Court had identified during the Court’s development of the CMO:

1. Whether this court has jurisdiction to adjudicate the said Tribal Claims. If so, to what extent should the court exercise its jurisdiction in these matters. In this connection, what is the scope of this court’s subject matter jurisdiction to adjudicate the Tribal Claims to groundwater, as well as to additional surface waters? CMO, ¶ 11.a.
2. Does federal law govern the pumping of groundwater on the Walker Lake Paiute Indian Reservation by the Tribe or the U.S. on its behalf? CMO, ¶ 11.b.
3. If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law, subject to different protections than those provided by State law? CMO, ¶ 11.c.
4. Whether the court has jurisdiction over groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute Reservation if such use interferes with the Tribe’s rights under federal law to use water from the Walker River system. If so, should the court exercise that jurisdiction? CMO, ¶ 11.d.
5. Whether equitable defenses bar some or all of the said Tribal Claims. Within such time as shall be fixed by the Magistrate Judge the parties now or hereafter appearing in the case shall file for consideration by the Magistrate Judge a statement as to any defenses or issues they intend to assert. CMO, ¶ 11.e.
6. Whether, regardless of the extent of hydrologic connection between surface and groundwater, this court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law. CMO, ¶ 11.f.
7. Are the holders of surface water rights established under federal law entitled to protection from the use of groundwater beyond the protection provided to holders of surface water rights established under state law. CMO, ¶ 11.g.
8. If the only jurisdiction of this court with respect to groundwater issues is to protect surface water rights established under federal law from interference by junior groundwater users, must the issues of interference be decided as a part of the adjudication of federal surface water claims. CMO, ¶ 11.h.

CMO at p. 9-11, ¶11. As identified below, the United States and the Tribe have included these issues among their proposed threshold issues, although they have rephrased some of them.

B. Filings by the United States and the Tribe regarding proposed threshold issues:

In 2008, the United States and the Tribe filed four pleadings that addressed proposed threshold issues:

1. *The United States of America's and Walker River Paiute Tribe's Proposed List of Preliminary Threshold Issues* (June 24, 2008; Doc. B-#1360) ("*Initial Proposed List*") (Exhibit 3).
2. *The United States of America's and Walker River Paiute Tribe's Opening Brief Regarding Proposed Preliminary Threshold Issues* (Sept. 5, 2008; #B-1411) ("*Opening Brief*") (Exhibit 4).

In the *Initial Proposed List* and in the *Opening Brief*, the United States and Tribe set out a general approach to threshold issues based on the CMO, regarding such issues as jurisdiction, finality, equitable defenses, and related case management.

3. *The United States of America's and Walker River Paiute Tribe's Response Regarding Proposed Preliminary Threshold Issues* (Oct. 10, 2008; #B-1442) ("*Response*") (Exhibit 5).

In the *Response*, the United States and Tribe address the basis for their proposed approach to threshold issues based on the subproceeding's historical and procedural context, while explaining how Defendants' proposed threshold issues are inconsistent with the CMO and the Federal Rules of Civil Procedure, avoid essential jurisdictional issues, and seek to address the merits of the Tribal Claims and other fact-intensive issues as threshold issues. The *Response* also addresses Defendants' expansive, varying and sometimes contradictory approaches to threshold issues in their initial filings.

4. *The United States of America's and Walker River Paiute Tribe's Reply Regarding Proposed Preliminary Threshold Issues* (Nov. 3, 2008; Doc. #B-1452) (“*Reply*”) (Exhibit 6).

In the *Reply*, the United States and Tribe explain that Defendants’ proposals are flawed not just because they contradict the CMO but because they contradict other orders of this Court as well as arguments many of the Defendants made previously – and successfully – in this very subproceeding.

A copy of each filing is attached in Exhibits 3 through 6. The following identifies and summarizes the issues that the United States and the Tribe assert should constitute the threshold issues in this subproceeding.

C. General approach to threshold issues

Plaintiffs addressed the general approach to threshold issues in each of their filings, stressing that efficiency is gained by determining basic questions as threshold issues, such as jurisdiction, questions of law, and the legal applicability of certain defenses.¹

First, the *Proposed List* and *Opening Brief* discuss the need to identify issues that are suitable for threshold review and comply with the Federal Rules of Civil Procedure.

Second, in the *Response*, Plaintiffs address the nature of the Tribal Claims, the phased structure of the CMO, and why Defendants’ numerous and varied proposed threshold issues would litigate the merits of the Tribal Claims as threshold issues and fail to comply with the Federal Rules of Civil Procedure, including the rules that govern dispositive motions and discovery.

Finally, in their *Reply*, Plaintiffs stress the need to institute the CMO’s orderly,

¹ Depending on the specific issue raised, its resolution may impact the other tribal and federal claims in this subproceeding that have been deferred to a later phase.

expeditious and fair process and avoid threshold issues that would determine the merits of the Tribal Claims.

See Proposed List at 3-4; *Opening Brief* at 2-5; *Response* at 2-9, 14-17; and *Reply* at 2-9.

D. Threshold Issues Related to Service

Plaintiffs believe service-related issues should be resolved as initial threshold issues because the CMO requires that service be complete before the list of threshold issues is finalized. Defendants contend these issues cannot be threshold issues. Regardless of their label, these are issues that need to be addressed before threshold issues can be litigated.

See CMO at 9, ¶ 11; *Response* at 14-15.

1. Whether service is complete: This issue includes a variety of matters currently under discussion, including challenges to the manner and extent of service; case caption; parties and entities identified and served; and parties and entities dismissed. *See e.g.*, CMO at 8, ¶ 9. This issue also includes the ongoing discussions regarding whether owners of unexercised, dormant riparian rights in California must be joined.² This appears to be where challenges to personal jurisdiction should be addressed. *See* later discussion on personal and subject matter jurisdiction at II.F. Fed. R. Civ. P. 12 (b) requires that certain challenges that fit within this general issue must be filed before answers are filed (*e.g.*, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process).

See Opening Brief at 4-5; *Response* at 14-15.

² The Court and parties have already addressed whether owners of overlying, unused groundwater rights in California should be joined. *See draft Minutes of the Status Conference Conducted on August 2, 2012* (Aug. 14, 2012; #B-1732); *proposed Order Addressing Whether Claimants With Overlying, Unexercised Groundwater Rights in the State Of California Are Subject to Compulsory Joinder in this Subproceeding* (Aug. 16, 2012; #B-1733).

2. **Whether publication should occur:** The parties and Court are already discussing, whether and how publication of summons should occur.

3. **Whether publication is complete:** This issue includes whether publication is adequate under applicable law.

4. **Whether any other categories of persons and entities should be served:** This issue includes whether any additional service should be required; the circumstances of such service; and the impact, if any, on the ongoing litigation. If the Magistrate Judge determines to expand service, *see* CMO at 3-4, additional time will be needed to complete the additional service.

E. Threshold Issues related to Case Management

The Court and parties are currently discussing case management issues, which is consistent with the CMO's direction that the Court address such issues "[f]ollowing completion of service of process on the said counterclaims." CMO at 8, ¶ 10. Defendants also contend that these issues cannot be threshold issues. Regardless of their label, the identification and resolution of these matters is essential for overall case management.

See Reply at 13-18.

1. Whether C-125-B is the proper proceeding for the Federal and Tribal claims or whether these claims must be filed in a new and separate action.

Previously, several Defendants rephrased one issue set forth in the CMO (¶11.a.)³ as:

³ The United States and Tribe do not agree that Defendants accurately capture the Court's issue, which the CMO states as follows:

Whether this court has jurisdiction to adjudicate the said Tribal Claims. If so, to what extent should the court exercise its jurisdiction in these matters. In this connection, what is the scope of this court's subject matter jurisdiction to adjudicate the Tribal Claims to groundwater, as well as to additional surface waters?

Whether this Court has jurisdiction to adjudicate new claims for additional surface and/or underground water in Case C-125, a case in which a final judgment has been entered, or must a new and separate action form the basis for these claims; and if so, to what extent should the Court exercise its jurisdiction in these matters?

E.g., Walker River Irrigation District's Opening Brief on Threshold Issues at 10 (Sept. 5, 2008; #B-1416). Defendants focus on the vehicle in which these claims are before the Court and not its authority to hear them. The United States and Tribe do not support its inclusion as a threshold issue and are surprised it would be proposed long after the Court designated subproceeding C-125-B, following their extensive effort and expense to conduct service, and following Judge Reed's recent order regarding service and successors-in-interest. *Order* (Apr. 23, 2012; #B-1711). Nevertheless, if any party wishes to raise this or a similar issue, it should be considered sooner, rather than later. The United States and Tribe believe, however, that this is a case management, rather than a jurisdictional, issue that is better phrased as:

Whether the fact that the Tribal and other federal claims were brought in Case no. C-125, a proceeding in equity, and separated by the Court into various subproceedings, including subproceeding C-125-B, constitutes a procedural error. If so, does this error deprive the District Court of jurisdiction and require that these claims be brought again in a new and separate action and be re-served on all defendants or does it constitute harmless error.

See Response at 19-20 (Section V.B.).

2. Resolution of any Case Management issue identified generally in the CMO at p. 8, ¶ 10.

This issue includes addressing and scheduling deadlines for such typical preliminary filings as amendments to claims and answers. Time will be needed, for example, to receive and assess answers, given the large number of counter-defendants, to determine, among other things, whether defenses and other issues raised therein should be addressed as additional threshold

issues. Resolution and sequencing of this issue depends in part on the Court's resolution of when defendants must file answers.

F. Threshold Issues related to Jurisdiction:

The CMO directs that threshold issues shall address jurisdiction. CMO at 9, ¶11. The United States and the Tribe believe subject matter and personal jurisdiction are threshold issues that must be resolved before the Court addresses the merits of any claim or defense. A federal court generally may not rule on the merits of a case prior to determining whether it has subject matter jurisdiction over the claims and personal jurisdiction over the parties, and parties cannot stipulate around a potential jurisdictional issue or confer subject matter jurisdiction on a Court. *E.g., Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998); *United States v. Griffin*, 303 U.S. 226, 229 (1938); *Town of Elgin v. Marshall*, 106 U.S. 578 (1883). In addition, Defendants appear to have backtracked from their initial position that the Court should determine its jurisdiction to hear groundwater claims. *See Response* at 14-15 (Section IV.A.1.); 17-19 (Section V.A.); 21-22; *Reply* at 9-13; *Proposed List* and *Opening Brief* at 7-8.

First, as noted above in Section II.D.1., personal jurisdiction is appropriately a threshold service issue. Second, subject matter jurisdiction should address:

1. Whether the Court has jurisdiction to adjudicate each of the Tribal Claims, including whether it has jurisdiction to adjudicate the claims to groundwater and the claims to surface water.

This issue is based on the issue set forth at p. 9-10, ¶ 11.a of the CMO, which is discussed above and at n. 3.

2. Whether the Court has jurisdiction to enforce tribal rights against claims to groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the Tribe's rights under

federal law to use water from the Walker River system? If so, should the court exercise that jurisdiction?

This issue is based on the issue set forth at p. 10, ¶ 11.d of the CMO.

3. Whether the Court has jurisdiction to enforce tribal rights against claims to groundwater used under State law outside the exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the Tribe's rights under federal law to use water from the Walker River system?

This issue based on the issue set forth at p. 11, ¶ 11.h of the CMO.

4. To the extent there is water in the system that is not covered by the Decree, does the Court have jurisdiction to determine rights in that water, among the parties to the Decree and among other users.

5. Any other jurisdictional challenges or issues of abstention.

G. Threshold Issues related to Applicable Law:

The CMO directs that threshold issues shall address applicable law. CMO at 9, ¶11. The parties disagree about the legal standards to determine and quantify the Tribal Claims. The Court should determine the correct legal standards before proceeding into the merits of the Tribal Claims so the parties and the Court will know what issues are relevant to discovery, testimony, evidence, and cross-examination and the parties do not invest time and resources in discovery, discovery disputes, motions, hearings, and at trial on potentially irrelevant issues and omit consideration of relevant issues. Issues of fact, particularly if they are extensive and disputed, are not appropriate components of threshold issues.

1. Applicable law for Groundwater claims and remedies:

a. Whether federal law governs the pumping of groundwater on the Walker River Paiute Indian Reservation by the Tribe or the United States on its behalf?

This issue is based on the issue set forth at p. 10, ¶ 11.b of the CMO.

- b. If the Tribe/United States have the right to pump groundwater under federal law, what remedies are available to protect these rights?

This issue is based on the issue set forth at p. 10, ¶ 11.c of the CMO. The United States and the Tribe contend that litigants should understand the applicable law to determine groundwater claims as well as the available remedies to protect them.

- c. Whether, regardless of the physical extent of hydrologic connection between surface and groundwater, legal distinctions found in California and Nevada law can operate to limit relief that is otherwise available to protect tribal rights under federal law?

This issue is based on the issue set forth at p. 10, ¶ 11.f of the CMO.

- d. Does federal law provide protections from groundwater interference to holders of surface water rights established under federal law that are greater than the protection provided to holders of surface water rights established under state law?

This issue is based on the issue set forth at p. 11, ¶ 11.g of the CMO.

See Response at 21- 22; *Reply* at 9-12.

2. The Desert Lands Act:

If Defendants continue to claim that the Desert Lands Act precludes federally reserved rights, this may present an issue of law that can be addressed as a threshold issue, although some facts may be necessary to develop.

See Response at 22.

H. Threshold Issues related to Finality or Claim Preclusion:

The CMO directs that threshold issues shall claim preclusion. CMO at 9, ¶11. The United States and the Tribe agree with defendants that issues of finality or claim preclusion will be a relevant consideration for the Court, but have not agreed that these issues may necessarily be addressed as threshold issues without extensive discovery and possibly expert testimony as to,

among other things, the 1936 Decree. If the Court retains these as threshold issues, it will have to define the scope of discovery without allowing full-blown discovery into all of the Tribal and other claims. See CMO at 13, ¶¶ 15-18.

The United States and the Tribe also identified a related issue raised by counter-defendants, which resolution the parties appear to agree will require further investigation and possibly a limited amount of discovery:

Whether the commencement and resolution of claims against the United States before the Indian Claims Commission, as continued before the Court of Claims, waives, bars or precludes litigation of the Walker River Tribal Claims against non-federal parties?

See Response at 23.

I. Threshold Issues related to Equitable and other Defenses:

The CMO directs that threshold issues shall address equitable and other defenses that **may be raised “by any party.”** CMO at 9, ¶11 (emphasis added). The CMO also requires that “[w]ithin such time as shall be fixed by the Magistrate Judge the parties now or hereafter appearing in the case shall file for consideration by the Magistrate Judge a statement as to any defenses or issues they intend to assert.” CMO at 10, ¶11.e. Thus, any defendant wishing to assert such defenses must both file the above statement and assert its defenses and issues in its answer because Plaintiffs will be prejudiced if they cannot determine from properly and timely-filed answers which defenses they wish to challenge.⁴

⁴ Although this earlier statement will assist the parties and the Court to ascertain the nature of issues to be addressed, because a party may change its mind, its answer may not mirror its earlier filed statement. Consequently, the Court’s initial consideration of these issues may be altered by the content of the answers, once they are filed.

As a general matter, the ability to assert a specific defense in this case as a matter of law should be an appropriate threshold issue, although application of any defense to a case should not be addressed in the abstract. The application of any specific defense in the case may ultimately require more discovery and consideration than to be classified automatically as a threshold issue. The availability of certain equitable affirmative defenses as a matter of law in the context of a federal reserved rights case could be determined as a threshold issue. The parties appear to agree with this proposition, although the United States and the Tribe disagree that the merits of any such defense are appropriate threshold issues.

See Response at 22, 24- (Sections VII, VIII, IX).

III. CONCLUSION

This Court should identify and determine threshold issues in a manner that is consistent with the Federal Rules of Civil Procedures. If the Case Management Order is reconciled with the Federal Rules of Civil Procedure, a realistic number of appropriate threshold issues can be identified and resolved.

Dated: August 20, 2012.

Respectfully submitted,

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Dated: August 20, 2012

Respectfully submitted,

By /s/ Wes Williams Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2012, I electronically filed the foregoing **IDENTIFICATION AND SUMMARY OF FILINGS BY THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE REGARDING:**

1 WHEN ANSWERS MUST BE FILED; AND

2. PROPOSED THRESHOLD ISSUES

with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case;

and I further certify that I served a copy of the forgoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 20th day of August, 2012:

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